UNIVERSITY OF TORONTO
FACULTY OF LAW

Supplemental Course Materials

INDIGENOUS PEOPLES IN INTERNATIONAL LAW

January 2001

Visiting Professor James Anaya

UNIVERSITY OF TORONTO
FACULTY OF LAW

Supplemental Course Materials

INDIGENOUS PEOPLES IN INTERNATIONAL LAW

January 2001

Visiting Professor James Anaya

CONTENTS

S. James Anaya, *Superpower Attitudes Toward Indigenous Peoples and Group Rights* (1999) 1

International Covenant on Civil and Political Rights 16

Human Rights Committee, General Comment 12 (Art. 1) 37

Human Rights Committee, *Concluding Observations regarding Canada* 39

Convention on the Elimination of All Forms of Racial Discrimination 42

Committee on the Elimination of Racial Discrimination, General Recommendation XXI on Self-Determination 57

Committee on the Elimination of Racial Discrimination, General Recommendation XXIII (51) concerning Indigenous Peoples 59

CERD Decision on Australia 61

Human Rights Committee, General Comment 23 (Art. 27) 64

Lansmann v. Finland 69

Francis Hopu v. France 81

American Convention on Human Rights 95

Inter-Am. Comm. H.R., Report on Ecuador 117

Petition by the Myagna Indian Community of Awas Tingni against Nicaragua to the Inter-American Comm.. H.R. 153

Superpower Attitudes Toward Indigenous Peoples and Group Rights

S. James Anaya[*]

Lecture delivered at the
93d Annual Meeting of the
American Society of International Law
March 24-27, 1999; Washington, D.C

Introduction

A good deal has been said about the historical complicity of international law—or dominant thinking about international law—in the oppression of minority and indigenous peoples and their cultures. So it is perhaps with some irony that groups that are identified as indigenous are now looking to international law as a means to reverse the historical patterns of oppression and to secure their cultural identities.

Largely as a result of their own advocacy at the international level, indigenous peoples or populations are now distinct subjects of concern within the United Nations, the Organization of American states, and other international institutions. For several years efforts have been underway within these institutions to develop new international normative instruments specifically for the benefit of indigenous peoples. While the terminology of *indigenous peoples* or *populations* remains contested, it nonetheless has become widely used. In general, the term indigenous is used in association with groups that maintain a continuity of cultural identity with historical communities that suffered some form of colonial invasion, and that by virtue of that continuity of cultural identity continue to distinguish themselves from others.

It can hardly be disputed that indigenous peoples have been able to generate substantial sympathy for their demands among international actors. This can be seen in several concrete developments, including the U..N. General Assembly's designation of an International Decade of the World's Indigenous People, which is currently ongoing, the International Labour Organization's adoption in 1989 of its Convention on Indigenous and Tribal Peoples, and in efforts at both the U.N and the Organization of American States to create declarations on the rights of indigenous peoples. Indeed, I and others have argued that international law is

---

[*] Samuel M. Fegtly Professor of Law, The University of Arizona; Special Counsel, Indian Law Resource Center.

developing with particular attention to indigenous peoples in a way that is favorable to their demands.[1]

But at the same time, a good deal of resistance persists against the indigenous agenda. This resistance is perhaps best represented by the positions being taken on the subject by the world's remaining superpower—the United States. In my remarks I want to identify and discuss the major positions being taken by the United States internationally on indigenous issues. It goes without saying that the United States is a powerful actor, and the positions it takes matter in terms of outcomes. We need only be reminded of the United States' recent participation in and its impact on the drafting of the Statute of the International Criminal Court, or its hand in the international response to events in the Balkans.

In examining the U.S position on indigenous issues, I will focus particularly on its positions as they relate to the drafting of U.N. and OAS declarations on the rights of indigenous peoples. My description of the U.S. position will be based on my observations of numerous written and oral statements made by the United States in connection with the declaration project over the last few years.[2] I will argue that essential aspects of the articulated U.S. posture on indigenous rights at the international level are unfounded, both as a matter of law and sound policy and that, furthermore, they are against the grain of international developments.

Indigenous Peoples' Advocacy and Steps Toward UN and OAS Declarations Concerning Their Rights

Before identifying and assessing the major United States' positions on the development of U.N. and OAS declarations on indigenous rights, some additional background is in order. As already mentioned, international developments concerning indigenous peoples that have occurred over the last several years can be attributed substantially to indigenous peoples' own advocacy. This advocacy has included the use

---

[1] *See, e.g.*, S. James Anaya, INDIGENOUS PEOPLES IN INTERNATIONAL LAW (1996); Siegfried Wiessner, *The Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis*, 12 HARV. HUM. RTS. J. 57 (1999).

[2] My assessment of the U.S. position is informed especially by its statement to the last session of the working group of the U.N. Commission on Human Rights which was established to consider a declaration on indigenous rights. *See* Leslie A. Gerson, Deputy Assistant Secretary of State, U.S. Dept. of State, General Statement, Commission on Human Rights Working Group on the Draft Declaration on the Rights of Indigenous People, Nov. 30, 1998.

of legal argument that incorporates notions of fairness and justice. Two dominant, usually complementary, strains of argument can be identified.

One strain of argument is essentially within a state-centered frame. Indigenous groups, often referred to as "nations," are identified as having attributes of sovereignty that predate and, to at least some extent, should trump the sovereignty of the states that now assert power over them. The rhetoric of nationhood is used to posit indigenous peoples as states, or something like states, within the perceived post-Westphalian world of separate, mutually exclusive political communities. Within this frame of argument, indigenous advocates point to a history in which the "original" sovereignty of indigenous communities over defined territories has been illegitimately wrested from them or suppressed. The rules of international law relating to the acquisition and transfer of territory by and among states are invoked to demonstrate the illegitimacy of the assault on indigenous sovereignty. Claims to land, group equality, culture, and development assistance stem from the claim for reparations for the historical injustice against entities that, *a priori,* should be regarded as independent political communities with full status as such on the international plane.

A second strain of argument employed by advocates of indigenous peoples is within a human rights frame. This strain of argument seizes upon the moral and ethical discourse that characterizes the modern human rights movement, that has the welfare of human beings as its subject, and that is concerned only secondarily, if at all, with the interests of sovereign entities. Indigenous peoples are portrayed as groups of human beings with fundamental human rights concerns that deserve attention. Historical narrative enters into this strain of argument to identify past acts of oppression against indigenous peoples, but the backward looking narrative is used to identify the origins and historical continuity of *present day* oppression and inequities that affect the lives of indigenous human beings and their communities. Affirmation of indigenous group rights, and related remedial measures to secure the enjoyment of these rights, are posited as moral imperatives and justified by reference to general human rights principles that are deemed to already be part of international law.

The United Nations and other international inter-governmental organizations, which together provide the institutional framework for the contemporary international system, have been most hospitable to the human rights strain of argument. By contrast, the state-centered historical sovereignty strain of argument naturally finds substantial resistance within inter-governmental organizations. Because of legal, institutional, and political factors, the major international organizations necessarily favor the spheres of sovereignty asserted by their member states over any claim of

competing sovereignty by a non-member entity. Claims that are grounded in the language of human rights, on the other hand, find greater opportunities for success by virtue of the institutional energies that the U.N. and other international organizations increasingly have devoted to human rights matters and moral considerations over the last several decades.

But while the human rights strain of argument advanced by indigenous peoples has been the more effective, the state-centered strain has not been without consequence. Accounts of the illegitimate wresting of historical sovereignty have strengthened the human rights arguments, by enhancing sensitivity toward the inequities suffered by indigenous peoples that can be understood in human rights terms. Such accounts have helped forge an understanding that indigenous peoples have suffered, not just discrete episodic acts of neglect or even brutality by state actors, but also more systemic oppression as a result of state institutional arrangements that have been imposed on them and failed to accommodate their cultural patterns.

Thus, with their arguments resonating within the discourse and institutional chambers of human rights, indigenous peoples have gained a foothold within the international human rights program. Their demands are now recurrent subjects of discussion within the major human rights institutions of the U.N., the OAS, and other international organizations that function at either the global or regional level. The ongoing attention to developing declarations on indigenous rights within the U.N. and OAS are prominent manifestations of the international response to indigenous peoples' demands. These developments are contributing to the articulation of a *sui generis* body of international human rights norms that is specifically concerned with indigenous peoples, a body of norms that already finds some expression in the International Labour Organization's Convention No. 169 on Indigenous and Tribal Peoples of 1989,[3] which as been ratified by a number of states in the Western Hemisphere and elsewhere.

A draft of a United Nations Declaration on the Rights of Indigenous Peoples[4] was produced and adopted in 1993 by the UN's five-member Working Group on Indigenous Populations, which is part of the Sub-

---

[3] Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries, Geneva, International Labour Conference, June 27, 1989 (entered into force Sept. 5, 1991).

[4] Draft United Nations Declaration on the Rights of Indigenous Peoples, as agreed upon by the members of the U.N. Working Group on Indigenous Populations at its eleventh session, Geneva, July 1993; adopted by the U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities by its resolution 1994/45, August 26 1994, U.N. Doc. E/CN.4/1995/2/, E/CN.4/Sub.2/1994/56, at 105 (1994).

Commission on Prevention of Discrimination and Protection of Minorities, an expert body. Representatives of indigenous peoples from around the world actively participated in the years of deliberation by the Working Group that began in the early 1980s and led to its draft of a declaration on indigenous rights. The draft declaration is now before the Sub-Commission's parent inter-governmental body, the U.N. Commission on Human Rights, which in 1995 established its own working group to consider the draft.

The focus within the U.N. on indigenous issues during the 1980s and '90s spawned initiatives in other international arenas, including the initiative within the OAS to develop its own declaration on the subject. Having been authorized by the OAS General Assembly to develop a "juridical instrument" on the subject, the OAS Inter-American Commission on Human Rights developed and adopted in 1997 a Proposed American Declaration on the Rights of Indigenous Peoples.[5] The Proposed American Declaration is now being considered by the Political and Juridical Committee of the OAS Permanent Council, which currently is in the process of refining a mechanism for further consultations on the proposed text.

The U.N. and OAS draft texts that are currently under consideration are similar in terms of scope of coverage and in the nature of the rights affirmed. Like the ILO's Convention No.169 on Indigenous and Tribal Peoples, both draft texts embrace a philosophy that, in contrast to earlier dominant thinking, values the integrity of indigenous communities and their cultures; and the texts identify indigenous groups and individuals as special subjects of concern for the states in which they live and for the international community at large. Further, like the ILO Convention, the draft U.N. and OAS texts presuppose that indigenous peoples will exist as parts of the states that have been constructed around them, but with robust group rights, including rights relating to land and natural resources, culture, and autonomy of decision-making authority. The draft U.N. and OAS texts are more sweeping than ILO Convention No. 169 in their articulation of such rights; the U.N. text is the most far reaching, going so far as to articulate a "right of self-determination" for all indigenous peoples.[6]

---

[5] Proposed American Declaration on the Rights of Indigenous Peoples, approved by the Inter-Am. Comm. on Human Rights on Feb. 26, 1997, in: 1997 Inter-Am. Com. H.R. Annual Report, OEA/Ser.L/V/III.95.doc.7, rev. 1997, pp. 654-676. This proposed text was a revision of an earlier draft, which the Inter-American Commission had published in September of 1995. See OEA/Ser/L/V/II.90, Doc. 9 rev. 1 (1995).

[6] *See* Draft United Nations Declaration on the Rights of Indigenous Peoples, *supra* note 4, art. 3.

United States Positions Regarding the Declarations

Having been relatively silent when the drafts of the U.N. and OAS declarations were being prepared, the United States is now weighing in to influence the outcome of the relevant deliberations. The United States has participated actively in the annual sessions of the U.N. Commission on Human rights working group that was established in 1995 to consider the U.N. draft declaration. The United States also has been involved in the discussions at the OAS to determine the fate of the proposed American declaration. With regard to both processes, the United States has been engaged in formal as well as informal deliberations with other interested states and, to a lesser extent, with representatives of indigenous peoples.

On several occasions the United States has stated its support for the adoption of "strong" declarations on indigenous rights, and for the "objectives and goals" of the existing U.N. and OAS drafts. A the same time, the United States has repeatedly stated positions that have gained it a reputation as unsympathetic to the aspirations of indigenous peoples and the proponents of the declarations. Indeed, the United States has placed itself at odds with essential aspects of the declaration projects.

Opposition to Use of the Term "Peoples"

Central to the United States' posture toward the U.N. and OAS declaration projects is its opposition to use of the term "peoples" to refer to the subject groups. Both the U.N. and OAS draft declarations use this term to designate the beneficiaries of the rights articulated in the drafts. This usage is substantially a result of the fact that indigenous groups have themselves insisted on being characterized as "peoples." Insistence on being referred to as "peoples" is matter of simple dignity for indigenous leaders, who argue that to fail to recognize the groups they represent as "peoples'" is do deny their existence as distinct communities with their own historically rooted cultures and institutions of human interaction. It is almost certainly the case that any declaration that fails to refer to indigenous groups as "peoples" will not be endorsed by the indigenous constituency. Yet in numerous public statements, the United States has in essence opposed the terminology preferred by indigenous groups, opting instead for the term "populations" or the tortured language of "persons belonging to indigenous groups."

The U.S. opposition to the term "peoples" is driven by its position on two other matters. First is the issue of collective rights. The United States has pointed out that to assign rights to "peoples" is to recognize group or collective rights. In this regard, the United States has clung to its traditional opposition to group rights. Second is the issue of self-

determination. According to the United States, usage of the term "peoples" implies a right of self-determination, since the U.N. Charter refers to the principle of "equal rights and self-determination of *peoples*"[7] and the international human rights covenants state that "[a]ll peoples have the right of self-determination."[8] The United States has argued that indigenous groups should not be understood to have a right of self-determination under international law, and it has opposed the language of the draft U.N. declaration that affirms for indigenous peoples such a right.

The caution with which the U.S. is approaching the issue of self-determination is understandable, although the formalism by which the United States considers "peoples" and "self-determination" necessarily linked, with the result that it rejects both in regard to indigenous groups, only serves to inflame indigenous sensitivities. A more pragmatic approach, in line with developing patterns of international and domestic practice, would be desirable. As I will argue in a moment, the right of self-determination should indeed be held to apply in favor of indigenous peoples. However, it is not necessary for the United States to concede this in order to refer to indigenous groups as "peoples."

The term "indigenous peoples"—the two words together—has become a term of art that is widely used in the legal academic literature, and that is increasingly found in the utterances and official acts of relevant international and domestic actors. In the relevant practice, usage of this term does not necessarily imply one position or another on the thorny issue of self-determination, as the term is often used without regard to that issue. The U.N. Human Rights Committee, the U.N. Committee on the Elimination of Racial Discrimination, and the Inter-American Commission on Human Rights have referred to "indigenous peoples" in their official pronouncements.[9] Resolutions of European institutions also have invoked the term.[10] Numerous states now regularly refer to "indigenous peoples"

---

[7] U.N. Charter art. 1(2).

[8] International Covenant on Economic, Social and Cultural Rights, 993 U.N.T.S.3, art 1(1); International Covenant on Civil and Political Rights, 999 U.N.T.S., art. 1(1).

[9] *See, e.g.*, H.R. Comm., *General Comment 23, Article 27*, HRI/GEN/1/Rev.1 at 38 (1994) (referring to use of land resources by "indigenous peoples"); *Concluding Observations of the Human Rights Committee: Canada*, CCPR/C/79/Add.105, at paras. 7,8 (1999) (regarding the rights of "aboriginal peoples" of Canada); "Committee on the Elimination of Racial Discrimination, *General Recommendation XXIII (51) concerning Indigenous Peoples*, CERD/C/51/Misc.13/Rev.4 (1997); Inter-Am. Com. H.R., Report on the Situation Human Rights Situation in Ecuador, OEA/Ser.L/V/II.96, at 99-106 (1997) (regarding the collective land and other rights of indigenous peoples" of the Ecuador).

[10] *See, e.g.*, Council of Ministers of the European Union, Resolution on Indigenous Peoples within the Framework of the Development Cooperation of the Community and Member States, 214th Council meeting, Brussels, 30 November 1998; European

in their statements before international conferences and institutions that are concerned with the topic. This international practice reflects the fact that several states—including Canada, Bolivia, Colombia, Ecuador, Mexico, Nicaragua, and Paraguay—now have specific reference to "aboriginal" or "indigenous peoples" in their domestic laws or constitutions. Reference to "indigenous peoples" can even be found in acts of the United States Congress and U.S. Executive Orders.[11]

The text proposed for the OAS declaration, which does not explicitly address self-determination, includes a provision stating that the mere "use of the term 'peoples' [in the declaration] shall not be construed as having any implications with respect to any other rights that might be attached to the term in international law."[12] This provision is consistent with growing international and domestic practice that effectively treats the term "indigenous peoples" as *sui generis*. In my view, given this practice, it is possible to consider implicit what the text proposed for the OAS declaration makes explicit with regard to usage of the term "peoples" in this context. The United States should thus be able to find it possible to refer to indigenous groups as "indigenous peoples," independently of its position on self-determination.

But while it is possible to divorce usage of the term "peoples" from the issue of self-determination, a similar separation is not possible with regard to the issue of group rights. This is because "peoples" are inevitably groups, and to ascribe rights to "peoples," as both the OAS and U.N. draft texts do, is to ascribe rights to groups.

Rejection of Collective or Group Rights

The United States' resistance to group rights, which stands regardless of its position on self-determination, goes strongly against the grain of the common agenda that underlies the U.N. and OAS declaration projects. Since early on in the U.N. and OAS processes of developing declarations on indigenous rights, it has generally been understood that these processes are primarily about articulating and affirming rights of indigenous *groups* as such, and not just about affirming the rights of *individuals* who happen to be members of indigenous groups. The case repeatedly has been made that the human rights of those segments of

---

Parliament, Resolution on Action Required Internationally to Provide Effective Protection for Indigenous Peoples, Strasbourg, 9 Feb. 1994, Eur. Parl. Doc. PV 58(II) (1994).

[11] *See, e.g.*, S. Con. Res. 44, 103d Cong., 1st Sess.(1993) (enacted) ("to express the sense of the Congress concerning the International Year of the World's Indigenous Peoples"); Executive Order of June 7, 1999, Increasing Participation of Asian Americans and Pacific Islanders in Federal Programs.

[12] Proposed American Declaration on the Rights of Indigenous Peoples, *supra* note___, art. I(1).

humanity that are identified as indigenous cannot be fully enjoyed unless their collective rights are acknowledged and protected. The focus on indigenous group rights in the draft U.N. and OAS texts, both of which were prepared by experts on the subject, manifest the prevailing assumption that this proposition is correct.

The United States has stressed that the *individual* human being is the central subject of human rights, and has pointed out that international human rights instruments generally are framed in terms of individual rights. It should go without saying that the individual human being is the ultimate beneficiary of entitlements that fall within the rubric of human rights. But a good deal of intellectual muscle has gone into demonstrating how the domain of human rights indeed includes rights that are enjoyed by human beings collectively or as groups.[13] It is just such collective rights that indigenous peoples have asserted and that are increasingly accepted by relevant international actors. The fact that most international human rights instruments articulate *individual* rights only goes to support the point made for years by indigenous advocates: that existing human rights instruments do not adequately address the needs and aspirations of indigenous peoples, which relate to the enjoyment of *collective* human rights.

Certainly, existing international law does not preclude or impede the recognition of indigenous group rights. This is made abundantly clear by the fact that indigenous group rights already are recognized and featured in ILO Convention No. 169 on Indigenous and Tribal Peoples. That international treaty, which is legally binding on the several states that have ratified it, affirms an array of rights belonging to "indigenous peoples." In the Convention a savings clause, similar to the one included in the proposed text for the OAS declaration, is attached to the usage of the term "peoples" to avoid implications regarding self-determination,[14] but that in no way undermines the collective nature of the rights affirmed. Also relevant is the practice of important international human rights bodies, including the U.N. Human Rights Committee, the U.N. Committee on the Elimination on Racial Discrimination, and the Inter-American Commission on Human Rights, each of which has referred to indigenous "peoples" as holders or beneficiaries of rights.[15] This international practice is consistent with trend in the domestic laws of virtually every state that admits to having indigenous groups within its borders, including the United

---

[13] *See generally* Peter Jones, *Human Rights, Group Rights, and Peoples' Rights*, 21 Hum. Rts. Q. 80 (1999); Allen Buchanan, *The Role of Collective Rights in the Theory of Indigenous Peoples' Rights*, 3 Transnat'l L. & Cotemp. Probs. 89 (1993).

[14] *See* Convention (No. 169) on Indigenous and Tribal Peoples, *supra* note___, art. 1(3).

[15] *See supra* note___.

States. That trend is to accord legal entitlements to indigenous peoples as collective entities.[16]

One effort at principled argument offered by the United States in its resistance to group rights is in the repeated assertion that such rights may come into conflict with the rights of the individual. But this argument presents what amounts to a non-issue, since implicit in any affirmation of a right, be it collective or individual, is the need to balance it in its application against any competing other right. International human rights bodies and the international community at large are increasingly disposed to recognizing and balancing among both individual and collective rights, particularly in the context of indigenous peoples.

In going against prevailing trends, the United States appears to be captive of a hangover from its Cold War era opposition to group rights, opposition that resulted from the linkage of collective rights with the system of social and economic rights championed by the former Soviet Union. The struggle for the primacy of individual over collective rights was part of the ideological struggle for the primacy of the U.S. model of the state over the Soviet one. That struggle is of course now dead, and whatever intellectual merit the U.S. position had in that Cold War debate is hardly relevant to the discussion over the articulation of indigenous rights.

Ultimately, whether or not the United States comes around to supporting the affirmation of indigenous rights as group rights in an international instrument is a policy determination that must be made with all relevant U.S interests in mind. Thus far the U.S. has failed to identify any interest or policy basis that weighs decidedly against international recognition of indigenous group rights, and none is readily apparent. In fact, an unclassified internal State Department memorandum, after recounting the U.S. position, essentially makes the point that no good reason exists for the U.S. to continue its resistance to indigenous group rights in relation to international standard-setting. The memorandum correctly points out that United States domestic law recognizes indigenous "tribes" as collective entities with rights opposable against U.S. and local governments.[17] The memorandum then asks the key question: "Why accept this domestically but not internationally in a proper case?"[18] This question remains unanswered.

---

[16] *See* Wiessner, *supra* note___ (surveying relevant legal developments throughout the world).

[17] J.R. Crook, Office of the Legal Advisor, U.S. Department of State, *Position Paper: "Draft Universal Declaration on Indigenous Peoples,"* July 9, 1993, at 8.

[18] *Id.*

Resistance to Indigenous Self-Determination

Undoubtedly, a more difficult issue is presented by the effort to extend indigenous group rights to include a right of self-determination, which may be aptly called the mother of all group rights. A central demand of indigenous peoples has been to have the international community recognize that they are entitled to determine their own destinies under conditions of equality. This includes the right of indigenous peoples to retain and develop their own systems of self-governance that are born of indigenous cultural patterns. In promoting this set of values, which are foundational to indigenous peoples' aspirations generally, indigenous advocates and leaders have seized upon the rhetoric of self-determination. The draft OAS text, as well as ILO Convention No. 169, go a long way toward affirming the values that are implicit in indigenous peoples' self-determination demands, although without explicitly affirming a right of self-determination for indigenous peoples.

The U.N. draft declaration, on the other hand, both promotes self-determination values through its numerous provisions *and* accedes to the demand to have a right of self-determination affirmed in express terms. The U.N. draft states that indigenous peoples have a right of self-determination in the same terms that the right is affirmed in the international human rights covenants. Article 3 of the draft states:

> Indigenous peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.[19]

Such an expression of a right of self-determination, of course, presents certain challenges. Interested states, including the United States, have legitimate concerns about draft article 3, concerns that have to do with avoiding unhealthy balkanization, ethnic animosity, and violent political upheaval that all too often have been associated with self-determination claims. But, especially in its most recent statement to the U.N. Commission on Human Rights working group on the declaration, the United States has gone beyond expressing such concerns, and it appears to have taken a stand against recognizing within the international sphere a right of self-determination for indigenous peoples.[20]

---

[19] Draft United Nations Declaration on the Rights of Indigenous Peoples, *supra* note___, art. 3.

[20] *See* Statement by Leslie A. Gerson, Deputy Assistant Secretary of State, *supra* note___ at 3 ("we do not believe that international law accords indigenous groups everywhere the right of self-determination").

The United States takes this stand on the grounds that self-determination as a matter of international law has been interpreted to necessarily include the right to secede and form an independent state, a right that the United States (and most other states) could not accept for all groups within the rubric of indigenous. However, reference to such an absolutist interpretation of self-determination is a plausible justification only if the United States assumes *either* that this is the correct interpretation, *or* that this interpretation has a real chance of prevailing and having practical consequences if a right of indigenous self-determination is affirmed. The United States cannot reasonably rest on either assumption.

The proposition that self-determination necessarily means a right to independent statehood is now so questionable—as reflected in the scholarly literature on the subject and the emerging pattern of authoritative responses to self-determination claims—that the United Sates cannot reasonably accept it as a premise of discussion without question. The Supreme Court of Canada recently expressed the now dominant view when it held that, even if Quebec were considered a people entitled to self-determination under international law, that would *not* mean the province would have a right to unilaterally secede from Canada. The Court rejected the absolutist interpretation of self-determination in favor of one in which self-determination is ideally exercised without threatening the political unity or territorial integrity of existing states. The Court held that, outside of limited circumstances of extreme oppression,

> peoples are expected to achieve self-determination within the framework of their existing state. A state whose government represents the whole of the people or peoples resident within its territory, on a basis of equality and without discrimination, and respects the principles of self-determination in its internal arrangements, is entitled to maintain its territorial integrity under international law and to have that territorial integrity recognized by other states.[21]

Not only is the contrasting absolutist interpretation of self-determination highly suspect as a matter of law or sound policy, it is highly improbable that such an interpretation may actually prevail in the context of indigenous peoples if they are considered to be holders of self-determination rights. Indigenous peoples themselves generally reject aspirations to independent statehood, and instead they see self-determination as a vehicle for establishing better relations with the other segments of society so as to secure, on agreed terms, their survival as

---

[21] Reference re Secession of Quebec, [1998] 2 S.C.R. 217, para. 154.

distinct groups with control over their own affairs. Relevant practice includes specific self-determination demands that particular indigenous groups from various parts of the globe have made and the authoritative responses that already have been forthcoming as a result of those demands. These authoritative responses point to diverse arrangements that are contextually determined from a range of options that do not involve dismembering states. By raising the specter of secession, the United States has cast a red herring.

As many have argued, it is indeed possible to interpret the right of self-determination as extending to indigenous peoples so as to advance their real aspirations and at the same time promote stability and harmony among groups within the framework of existing state boundaries.[22] For several years now, more and more states have expressed a willingness to consider or even outright adopt such an interpretation. This trend is highlighted by Canada's statement at the 1996 session of the U.N. Commission on Human Rights working group on the draft declaration:

> [A] survey of state practice and academic literature suggests that the understanding of the right of self-determination is expanding to include the concept of an internal right, for groups living within existing states, that respects the territorial integrity of states. Thus, in accordance with the *Declaration on Friendly Relations and Cooperation Among States*, it could not be used to justify any action that would dismember or impair, totally or in part, the political unity of sovereign democratic states. The principle is aimed towards establishing a framework for the full enjoyment of all human rights while respecting the political and constitutional framework of states.
>
> Our goal at this Working Group will be to develop a common understanding, consistent with evolving international law, of how this right is to apply to indigenous collectivities, and what the content of the right includes. Once achieved, this common understanding will have to be reflected in the wording of Article 3.
>
> Mr. Chairman, I wish to state at this point that the Government of Canada accepts a right of self-determination for indigenous peoples which respects the political, constitutional and territorial integrity of democratic states. In that context, exercise of the right involves negotiations between states and the various indigenous peoples within those states to determine the political status of the indigenous peoples involved, and the means of pursuing their economic, social and cultural development. These negotiations

[22] My own argument in this regard is in Anaya, *supra* note___, at 75-96.

> must reflect the jurisdictions and competence of governments and must take account of the different needs, circumstances and aspirations of the indigenous peoples involved.[23]

It should not be difficult for the United States to follow Canada's lead. Since the early 1970's the United States has had a formal domestic policy, backed by legislation, of promoting "Indian self-determination." This policy, which includes measures to enhance and strengthen the powers and autonomy of Native American tribes, has been reaffirmed by successive U.S. executive administrations through the present one. In its initial report to the U.N. Human Rights Committee, submitted in 1994 pursuant to its reporting obligation under the International Covenant on Civil and Political rights, the United States gave an extensive account of its law and policy regarding Native Americans, including its domestic self-determination policy.[24] And it gave this account in reference to article 1 of the Covenant, which is the provision affirming that "[a]ll peoples have the right of self-determination." The United States thus implicitly acknowledged the applicability of the international right of self-determination to indigenous peoples, as well as the linkage between that right under international law and the U.S. domestic law and policy regarding Native Americans. In its recent public statements regarding the self-determination issue, the United States appears to have forgotten its 1994 report to the Human Rights Committee.

The Committee, however, recently confirmed that indigenous peoples are holders of self-determination rights that are protected by article 1 of the Covenant. In its concluding observations regarding Canada's fourth periodic report under the Covenant, the Committee urged Canada to report on its implementation of article 1 of the Covenant in regard to the concept of self-determination as applied to indigenous peoples.[25] The Committee also emphasized that the right of self-determination requires all peoples, including indigenous peoples, to be able to freely dispose of their natural wealth.[26]

Rather than resist the increasingly strong current of thought that sees indigenous groups as peoples entitled to self-determination, the

---

[23] Canadian Statement to the UN Working Group on the Draft Declaration on the Rights of Indigenous Peoples, October 31, 1996.,

[24] *See* US. Dept. of State, *Civil and Political Rights in the United States: Initial Report of the United States of America to the U.N. Committee on Human Rights under the International Covenant on Civil and Political Rights*, July 1994, at 36-46, Dept. State Pub. 10200 (1994).

[25] *Concluding observations of the Human Rights Committee: Canada*, *supra* note___, para.7.

[26] *Id.* at para. 8.

United States should join that current and engage in the discussion to clarify the nature of the right. The posture the United States takes in this regard will surely have implications for other areas of its foreign policy, given the prominence of self-determination issues on the global stage. But this should not detract from a progressive stance. Given its substantial power and influence, the United States has the opportunity to help cast self-determination as an effective instrument of peace and harmony, not just in the indigenous context but for other contexts as well.

Conclusion

If the United States is to fulfill its stated objective of promoting strong U.N. and OAS declarations that are beneficial to indigenous peoples and that advance human rights, it will need to change its course. The United States' attitude toward the drafting of these declarations is out of step with even its own relevant domestic law and policy, which accord indigenous peoples rights as collective entities and formally embrace a notion of indigenous self-determination. The U.S. position appears calculated to avoid the development of international standards that will obligate it to improve upon or even leave intact its current domestic law and policy regarding indigenous Americans. Such a posture is not the stuff of a leader in the field of international human rights.

U.S. administration officials are fond of pointing out the responsibilities of leading the world's remaining superpower. They argue how the superpower status and the force at its disposal can be made to do good. Unfortunately, indigenous peoples are experiencing the dark side of the force.